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No. 99-1994

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In The

Supreme Court of the United States

STATE OF NEVADA, ET AL.,

Petitioners,

v.

FLOYD HICKS, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICI CURIAE* OF THE PYRAMID LAKE PAIUTE TRIBE OF NEVADA, THE WALKER RIVER PAIUTE TRIBE OF NEVADA, THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, THE FORT MOJAVE INDIAN TRIBE, THE MASHANTUCKET PEQUOT TRIBE, AND THE MOHEGAN TRIBE OF CONNECTICUT IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

The *Amici Curiae* are all federally recognized Indian tribes with established tribal justice systems which provide reservation residents a forum to adjudicate civil actions involving both Indians and non-Indians. *Amici* have a significant interest in this case, because it involves a challenge to tribal court jurisdiction over a civil action filed by a tribal member against a nonmember and arising Indian trust land. *Amici* are concerned with protecting their territorial sovereignty by protecting the jurisdiction of the tribal courts which derive from that sovereignty.

SUMMARY OF ARGUMENT

The Fallon Paiute-Shoshone Tribal Court has jurisdiction over civil actions filed by tribal members against nonmembers when the action arises within the boundaries of the reservation. This jurisdiction is supported both by this Court's precedent and the laws and policies of Congress and the Executive branch. The Tribal Court's jurisdiction in civil matters involving tribal members has not been divested by Congress. Moreover, the exercise of jurisdiction is not consistent with the Tribe's dependent status because it is not inconsistent with the overriding interests of the federal government. By enacting laws,

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[1] Pursuant to Sup. Ct. R. 37.3, *Amici* submit this Brief *Amicus Curiae* with the consent of all parties. The consents are submitted for filing herewith. Pursuant to Sup. Ct. R. 37.6, counsel for *Amici* state that no counsel for a party authored this Brief in whole or in part.

such as the Indian Tribal Justice Act and the Indian Tribal Justice Technical and Legal Assistance Act of 2000, Congress has expressed its view that tribal court jurisdiction derives from the inherent authority of Indian Tribes to establish their own form of government and tribal courts are essential to its maintenance, and that the civil jurisdiction of tribal courts extends to actions arising on their reservation. This Court's precedent also supports the *Amici* position. This Court has recognized that tribal courts play a vital role in tribal self-government and their civil jurisdiction extends to disputes between tribal members and non-Indians. This Court has also enunciated two principles which should control in this case: tribes presumptively have authority over non-Indians for actions occurring on Indian trust lands unless expressly limited by treaty or statute and that tribal courts, not federal courts, should initially determine the scope and existence of tribal court jurisdiction in actions arising on the reservation.

As *Amici* demonstrate in this Brief, validation of the State's position will undermine congressional goals and require the reversal of controlling Supreme Court precedent. *Amici* believe that tribal sovereignty is not a mere legal abstraction. Rather, sovereignty is the very real and critical ability of an Indian tribe to make and enforce applicable laws in situations similar to those in the present case and in a manner parallel to that of other governments. *Amici* urge the Court to adhere to the laws and policies of Congress and its own precedent by upholding the jurisdiction of the Tribal Court.

ARGUMENT

I. THE INHERENT SOVEREIGNTY OF THE FALLON PAIUTE-SHOSHONE INDIAN TRIBE SUPPORTS THE EXERCISE OF TRIBAL COURT JURISDICTION OVER A CIVIL ACTION FILED BY A TRIBAL MEMBER WHICH ARISES ON RESERVATION TRUST LAND.

Since the formative years of this Nation's existence, this Court has acknowledged that Indian tribes are governments who possess sovereignty over their territory as well as their members. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-60 (1832); *Williams v. Lee*, 358 U.S. 217, 222-23 (1959); *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (*Mescalero Apache*); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); *California, et al. v. Cabazon Band of Mission Indians, et al.*, 480 U.S. 202, 206 (1987). This sovereignty is inherent, it is not delegated to tribes by Congress. It exists by virtue of the United States' historical recognition of Indian tribes as independent political entities, whose existence as such predates this nation's existence. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978); *Talton v. Mayes*, 163 U.S. 376, 383-84 (1896).

The jurisdiction of tribes to regulate and control the activities of non-Indians on reservation land is an important part of the Tribe's territorial sovereignty, and is supported by Congress:

> We have stressed that Congress's objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress's overriding goal of encouraging tribal

> self-sufficiency and economic development. In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of their territory and resources by both members and nonmembers.

Mescalero Apache, 462 U.S. at 335; *accord*, *Williams*, 358 U.S. at 223.

This authority includes a "broad measure of civil jurisdiction over the activities of non-Indians on reservation lands in which the tribes have a significant interest." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980). Jurisdiction over such matters "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual*, 480 U.S. at 18. Although this Court has limited the exercise of tribal civil jurisdiction over the conduct of non-Indians on reservation land which has been alienated in fee to non-Indians, *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes and Bands of Yakima Indian Reservation*, 492 U.S. 408 (1989); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Strate v. A-1 Contractors, et al.*, 520 U.S. 438 (1997), the rulings in those cases do not apply for the reasons discussed below.

A. The Doctrine Of Tribal Sovereignty Is Grounded In The Constitution And Laws Of The United States, Supported By History.

Despite Petitioner's argument to the contrary (Pet. brief, 14-16) the Constitution recognizes the existence of

Indian tribes as sovereign governments, and this recognition is grounded in both history and the law of nations. *See* Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 Geo. L.J. 17 (1942) ("In the first place, we must recognize that our Indian law originated, and can still be most clearly grasped, as a branch of international law. . . . "). Moreover, this territorial sovereignty is supported by a history of Indian treaties and statutes passed by Congress. The constitutional basis of the Indian sovereignty doctrine must be analyzed in this context.

Prior to the Revolutionary War, there were a number of Indian tribes in what is now the eastern United States who possessed sizable military strength, and the founding fathers were well aware of the existence of powerful Indian tribes to the north, south and west of the original colonies. During the war both the European governments and the colonists sought neighboring tribes as allies in their struggle for control of the New World. The colonists knew that the military support from the strong eastern tribes would undoubtedly influence the fighting. *See* Barbara Graymont, *The Iroquois in the American Revolution* 66 (1972). Thus, many of the early Indian treaties were treaties of peace and friendship with the tribes whereby the colonists sought the aid of the tribes against the British. The early Indian treaties were born of the need of the colonists to have the more powerful tribes as their allies and not just as a mechanism to acquire lawful title to the Indians' land. *Id.*; F. Cohen, *Handbook of Federal Indian Law* 55, 58-62 (1982 ed.); *see* Vine Deloria, Jr., *Behind the Trail of Broken Treaties*, 118-120 (1974) (discussing the 1778 treaty between the Delaware Indians and the United

States). The competition for tribes as allies continued through the War of 1812 with Britain. *See, e.g.*, Treaty with the Wyandots, Delawares, Shawanoese, Senecas and Miamies, July 22, 1814, 7 Stat. 118. It also resulted in a series of treaties with the Cherokee and other tribes in the south who, together with Spain still constituted a sizable military threat. Francis Paul Prucha, *American Indian Treaties* 59 (1994).

It is against this historical background that the Treaty Clause and Commerce Clause of the Constitution must be read. Indian tribes find express constitutional recognition in the Commerce Clause which gives Congress the power to "regulate commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. Placed in historical context, it is no mere coincidence that the Commerce Clause of the Constitution places Indian tribes alongside foreign nations and state governments within the constitutional framework. Tribal sovereignty also finds implicit recognition in the Treaty Clause of the Constitution which gives the President the power to make treaties with the advice and consent of the Senate. *Id.* at art. II, § 2 cl. 2. At the time the Constitution was made, it was common practice for the colonists, and later the United States to execute treaties with the Indian tribes, so it is not hard to conclude that the framers of the Constitution had Indian tribes in mind when the Treaty Clause was drafted. *See* A. Bothwell, *We Live On Their Land: Implications of Long Ago Takings of Native American Indian Property*, 6 Ann. Surv. Int'l & Comp. L. 175, 177-181 (2000).

The early treaties and the Indian treaties and laws that followed the settlement of the West embodied the

notion that the tribes possessed original sovereignty and had a prior legal claim to the land they occupied, *Johnson v. McIntosh*, 21 U.S. 543, 544 (1823), a claim that could only be extinguished by Congress. 25 U.S.C. § 177. This concept of territorial sovereignty was incorporated by this Court into United States law in a series of early cases involving the Cherokee Nation, and these cases established the foundation upon which the doctrine of tribal sovereignty and the government-to-government relationship between the United States and Indian tribes is based.

In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Cherokee Nation sought an injunction to prevent the state of Georgia from enforcing its laws and trespassing upon the territory reserved to the Cherokee by treaty. The Cherokee argued that their treaties with the United States were an express recognition of their territorial sovereignty. *Id.* at 4. In addition, the Cherokee asserted the supremacy of federal treaties over state law under the Constitution's Supremacy Clause. The Court, in an opinion by Chief Justice John Marshall agreed. "The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts." *Id.* at 16. In a concurring opinion, Justices Thompson and Story concluded that the Cherokee was a "sovereign independent nation or foreign state," and this applied to all other tribes as well. 30 U.S. at 32.

One year later, this Court held that Georgia had no jurisdiction to prosecute non-Indians doing missionary work in Cherokee Territory. *Worcester*, 31 U.S. at 556-57. The Court found that the tribes had signed treaties and been treated as sovereigns by the European nations, and

the United States had continued this relationship of alliances through treaties, "which itself evidenced a constitutional acknowledgment of the Tribes' sovereign status." Cohen, *Handbook of Federal Indian Law* 234. The Court stated:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial. . . . The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

31 U.S. at 559.

The Court then rejected Georgia's argument that the Cherokee Nation had somehow given up its sovereignty by agreeing to a treaty in which the Cherokee agreed to peace and accepted the care and protection of the United States.

> The settled doctrine of the law of nations is that a weaker power does not surrender its independence – its right to self-government, by

> associating with a stronger and taking its protection. A weak State in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a State.
>
> * * *
>
> The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which, the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States.

31 U.S. at 560-561.

Worcester established that the state had no authority to regulate activities within the territory reserved to the tribe unless Congress, pursuant to the exercise of its own authority under the Commerce Clause, expressly authorized state jurisdiction. 31 U.S. (6 Pet.) at 561-562. Together, *Cherokee Nation* and *Worcester* stand for the proposition that there exists, within the constitutional framework, a unique government-to-government relationship between the United States and Indian tribes. The relationship is one of trust, grounded in treaties, the laws of Congress, the Indian Commerce Clause, under which the tribes within their territory generally govern free of state interference subject only to the power of Congress to limit their authority. The Cherokee cases are the legal

foundation upon which tribal sovereignty is based, a foundation which is supported by history as well as the Constitution. The Court should reject the Petitioner's argument that tribal sovereignty cannot co-exist with the sovereignty of the federal and state governments. That is simply not the law.

B. Both Congress And The Executive Branch Recognize And Support The Territorial Sovereignty Of Indian Tribes In General And The Civil Jurisdiction Of Tribal Justice Systems In Particular.

The principles of self-government which underlie the decisions in *Cherokee Nation* and *Worcester* find express historic recognition in the laws of Congress and policies of the Executive Branch, and they remain embodied in the current federal policy which supports tribal self-determination. Although formal treaty-making came to an end in 1871, both Congress and the Executive Branch continued to establish reservations for tribes by agreements, statutes and Executive Orders. This Court has acknowledged that these treaty substitutes carry the same weight and legal effect as a treaty. *Antoine v. Washington*, 420 U.S. 94, 200-04 (1975); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133 n.1 (1982). Implicit in these laws establishing Indian reservations is the notion that they are set aside "within the exclusive sovereignty of the Tribe under general federal supervision." *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 175 (1973); *Williams*, 358 U.S. at 222-23. Congress codified this notion in 1948 when it adopted the general definition of Indian Country, 18 U.S.C. § 1151, within which jurisdiction primarily rests

with the federal and tribal government. *Alaska v. Native Village of Venetie Tribal Government, et al.*, 522 U.S. 520, 527 n.1 (1998); *DeCouteau v. District Court*, 420 U.S. 425, 427 (1975). Congress just recently reaffirmed this proposition in § 4(2) of the Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. 106-559, which defines the term "Indian lands" as "lands within the definition of 'Indian Country', as defined in [18 U.S.C. § 1151]."

Today both Congress and the Executive Branch remain firmly committed to promoting and protecting tribal sovereignty and self-government, including promoting tribal courts. The President's recent Executive Order of May 14, 1998 declares the commitment to tribal sovereignty, a commitment based upon the historic government-to-government relationship which has existed between the United States and Indian tribes:

> The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights.

Exec. Order No. 13084, 63 Fed. Reg. 27655 (1998); *accord*, Exec. Order No. 13175, November 6, 2000, 65 Fed. Reg. 67249.

Since the passag of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450, *et seq.*, Congress has consistently reaffirmed its recognition and support of tribal self-government. e.g., *Mescalero Apache*, 464 U.S. at 334-35 n.17; *Iowa Mutual*, 480 U.S. at 14-15 nn.5 & 6.[2] In deference to the authority of Congress in matters of tribal jurisdiction, this Court's decisions have "followed Congress' lead in this area." *County of Yakima, et al. v. Confederated Tribes and Bands of the Yakama Indian Nation*, 502 U.S. 251, 261 (1992); *Colville*, 447 U.S. at 152-53; *Merrion*, 455 U.S. at 149-52.

Perhaps the strongest recent signal from Congress in support of tribal sovereignty comes in the Indian Tribal Justice Act of 1993, 25 U.S.C. §§ 3601-3631, and the Indian Tribal Justice Technical and Legal Assistance Act of 2000, *supra*. The 1993 Act rests upon congressional findings expressly reaffirming the importance of tribal sovereignty and the role of tribal courts in promoting and preserving tribal sovereignty:

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[2] More recent examples of congressional acts in this area are §§ 2-3 of the Indian Tribal Self-Governance Amendments of 2000, Pub. L. 106-260 14 Stat. 711; the Native American Business Development, Trade Promotion, and Tourism Act of 2000, Pub. L. 106-464, 114 Stat. 2012; the American Indian Agricultural Resource Management Act, 25 U.S.C. §§ 3701-3702; the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4021; and the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101.

> The Congress finds and declares that –
>
> (1) there is a government-to-government relationship between the United States and each Indian tribe;
>
> (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;
>
> (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;
>
> (4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;
>
> (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;
>
> (6) Congress and the federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights.

25 U.S.C. §§ 3601(1)-(6).

The legislative history of the Indian Tribal Justice Act clarified Congress' intent to reaffirm tribal court jurisdiction over disputes between tribal members and nonmembers on reservation land:

> [25 U.S.C. § 3601(6)] was added to emphasize that tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals. The

> language tracks similar language of the Supreme Court in its ruling in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, (1978), in which the Court stated that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important and personal property interests of both Indians and non-Indians."

S. REP. NO. 88, 103RD CONG., 1st Session 8 (1993).

In addition, the House Report clarified Congress' understanding that Indian tribal courts retain the right to exercise civil jurisdiction within their territory, including jurisdiction over the activities of non-Indians on reservation land in which the tribes have a significant interest. "Hence, non-Indians may be sued in tribal court." H.R. Rep. No. 205, 103rd Cong., 1st Session at pp. 8-9 (1993). The subsequent 2000 Act itself speaks of tribal jurisdiction over "Indian lands," which are defined to include all lands within the boundaries of an existing reservation. Pub. L. 106-559, §§ 2(2) and 4(2), 114 Stat. 2778, 2779 (2000).

It is against these statements of congressional support for tribal self-government in general and tribal court jurisdiction in particular that this Court must determine the issue of tribal court jurisdiction over Floyd Hicks' cause of action. As shown below, federal law has not divested the tribal court of its subject matter jurisdiction in this case.

C. While There Are Federal Limitations On The Exercise Of Tribal Jurisdiction Over Non-Indians In Indian Country, Those Limitations Are Not Applicable Here.

When Chief Justice Marshall wrote the *Worcester* decision he defined the nature and limits of tribal territorial sovereignty with an easy straightforward approach, one which deferred to the power of Congress to diminish Indian sovereignty. The Court held simply that the Cherokee Nation was a separate political entity with a territory whose borders were defined by federal law and within which state authority could not apply absent the express consent of Congress, pursuant to its delegated authority to regulate Indian commerce under the Commerce Clause. 31 U.S. at 551-60. Admittedly, this Court has departed from the conceptual clarity of *Worcester*. *Mescalero Apache Tribe*, 462 U.S. at 331. Although today tribes still possess sovereign authority over both their members and their territory, their territorial sovereignty is no longer considered absolute. Rather, it is described as having "a unique and limited character." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). As a general rule, however, Indian tribes today still possess those aspects of their inherent sovereignty which are not expressly withdrawn by treaty or statute, or by "implication" as a necessary result of their dependent status. *Wheeler*, 435 U.S. at 323.

The Petitioner can point to no act of Congress which has diminished the civil jurisdiction of the Fallon Paiute-Shoshone Tribe or its tribal court, and indeed no such act

exists.[3] On the contrary, as shown previously, the relevant statutes passed by Congress reflect a policy which supports tribal court jurisdiction.

The question then, is whether the exercise of tribal jurisdiction over civil actions arising on reservation trust land, brought by tribal members against non-Indians, is inconsistent with the dependent status of the tribes within the meaning of *Wheeler* and this Court's subsequent cases on the subject. In addressing this question, this Court has admonished that it may not lightly imply a judicial divestiture of tribal authority:

> a proper respect both for tribal sovereignty itself, and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.

Merrion, 455 U.S. at 1495, quoting *Santa Clara*, 436 U.S. at 60.

The exercise of jurisdiction by the tribal court over Hicks' cause of action is not inconsistent with the tribe's

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[3] When Congress wishes to limit tribal jurisdiction it knows how to do so expressly. *See, e.g.*, General Allotment Act of 1887, 25 U.S.C. §§ 331 *et seq.*; Pub. L. 83-280, 18 U.S.C. § 1162, and 28 U.S.C. § 1360, as amended, 25 U.S.C. §§ 1321-1326; the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302-1303; the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* When Congress does decide to place limitations on the exercise of tribal authority, it is careful to draw those limitations narrowly. *See Santa Clara*, 436 U.S. at 62-66 (discussing the effect of the Indian Civil Rights Act); *Bryan v. Itasca County*, 426 U.S. 373, 388-91 (1976) (discussing Pub. L. 280); 25 U.S.C. §§ 2701-2702 (setting forth dual goals of federal regulation of Indian gaming and preservation of tribal self-government).

dependent status. In cases which involve the exercise of tribal civil jurisdiction over non-Indians on trust land, this Court has found implicit divestiture only "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government." *Colville*, 447 U.S. at 153. The Petitioners have not shown how or why tribal court jurisdiction over civil actions involving tribal members is inconsistent with any overriding federal interest. On the contrary, federal policy supports tribal jurisdiction in such cases, as does this Court's precedents. *See, e.g., Montana*, 450 U.S. at 557 (recognizing broad authority to regulate and even prohibit non-Indians from hunting or fishing on Indian trust land); *Iowa Mutual*, 480 U.S. at 18 ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute").

It is true that this Court in *Montana* said that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the Tribes and so cannot survive without express congressional delegation." 450 U.S. at 564 (citations omitted). But that statement must be put in the context in which *Montana* was presented to the Court, and it must be applied consistently with this Court's other precedents. In particular, one of the cases cited in *Montana* to support the above-quoted statement was *Williams v. Lee, supra*, and it is that case which governs the analysis of tribal court jurisdiction here.

The Court in *Williams* held that Arizona courts lacked jurisdiction to adjudicate a civil dispute between a tribal member and a non-Indian merchant which arose on the Navajo Reservation. In upholding the territorial jurisdiction of the Tribe, the Court stated that when the Navajo Reservation was set aside by the United States it was with "the understanding that the *internal affairs* of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." *Williams*, 358 U.S. at 221-22 (emphasis added). The Court then stated:

> [T]o allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that [the merchant] is not an Indian. He was on the reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the treaty of 1868, and has done so ever since. If this power is to be taken from them, it is for Congress to do it.

358 U.S. at 223 (emphasis added).

The significance of the Court's decision in *Williams* was the recognition that the "internal affairs" of an Indian tribe can involve non-Indians when the conduct of non-Indians has an effect on the tribe or its members. In such cases, tribal jurisdiction remains intact. *Accord, Colville*, 447 U.S. at 153; *Iowa Mutual*, 480 U.S. at 18.

1. Montana's Main Rule and Exceptions Are Not Applicable to Causes of Action Arising on Trust Land.

The Petitioner's reliance on *Montana, Brendale, Bourland* and *Strate* to support the argument that the Fallon Tribal Court lacks jurisdiction is misplaced for a number of reasons. First and most important, all of those cases involved a tribe's assertion of jurisdiction on alienated fee land, *Montana*, 450 U.S. at 557; *Brendale*, 492 U.S. at 414; *Bourland*, 508 U.S. at 681, or on a public highway owned and regulated by the state, which the Court equated with fee land. *Strate*, 520 U.S. at 454. By contrast, the case at bar arose on Indian trust land within the boundaries of the reservation. As stated above, this Court recognizes that tribal authority over the conduct of non-Indians on trust land remains broad and exclusive, 450 U.S. at 557; *Strate*, 520 U.S. at 454, and that tribal courts presumptively have jurisdiction in such cases. *Iowa Mutual*, 480 U.S. at 18.

Second, underlying the decisions in *Montana, Brendale* and *Bourland* were congressional acts which supported the Court's decision that tribal jurisdiction had been limited. Both *Montana* and *Brendale* involved former allotted lands alienated in fee to non-Indians under the General Allotment Act, 25 U.S.C. §§ 331 *et seq.*, an "avowed purpose" of which "was the ultimate destruction of tribal government." *Montana*, 450 U.S. at 559 n.9; *see Brendale*, 492 U.S. at 422-24. The Court's subsequent decision in *Bourland* was also supported by legislation under which Congress had clearly expressed its intent to diminish tribal jurisdiction over former reservation lands taken by the statutes in question. 508 U.S. at 689-94. No

such Act of Congress supports the Petitioner's argument that the Fallon Paiute-Shoshone Tribal Court lacks jurisdiction here.

2. The Court's Decision in Strate is Not Applicable to Civil Actions Brought By Tribal Members.

Admittedly, unlike *Montana*, *Brendale* and *Bourland*, there was no federal statute in *Strate* that supported a limitation on tribal court jurisdiction. The Court focused instead on its own holding in *Montana*. Nevertheless, the decision in *Strate* is not inconsistent with *Williams*, *supra*. No tribal member was a party in *Strate*, the tort action involved two non-Indians. 520 U.S. at 444 n.3. As such the Court in *Strate* emphasized that the dispute was "distinctly nontribal in nature. It arose between two non-Indians involved in a run-of-the-mill highway accident . . . and the Tribes were strangers to the accident." 520 U.S. at 457. There was thus no tribal interest sufficient to support tribal court jurisdiction in *Strate*. The Court acknowledged, however, citing *Williams*, that tribal courts could assert jurisdiction, even on alienated fee land, in those cases where there is "a significant tribal interest at stake." 520 U.S. at 458.

Unlike *Strate*, the dispute in the case at bar is tribal in nature because it involves a tribal member's complaint against a non-Indian, who was on the reservation with the conditional consent of the tribal court, and whose conduct on the reservation it is alleged, violated the law and the terms of that consent and resulted in injury to a

tribal member's property. Such an action clearly falls within the jurisdiction of the tribal court under *Williams v. Lee*.

Properly understood, *Montana* and *Strate* stand for the proposition that, with respect to conduct on fee lands, there must be some relationship, connection, or nexus between the reservation-based activities of non-Indians and a significant Indian interest in order for those non-Indian activities to be subject to tribal jurisdiction. In the vernacular of *Williams* itself, both *Strate* and *Montana* fit into the category of cases "where essential tribal relations were not involved and . . . where the rights of Indians would not be jeopardized," and therefore the state action did not "infringe on the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. at 219-20; *see also Colville, supra*, 447 U.S. at 152-53 ("Included in this [retained] tribal [sovereign] power is a broad measure of civil jurisdiction over the activities of non-Indians on Indian Reservation lands *in which the tribes have a significant interest.*" (emphasis added)). Indeed, that is precisely how *Montana* was construed by a unanimous Court in *Mescalero Apache*, 462 U.S. at 330-31 and n.12; *see Brendale*, 492 U.S. at 443 (distinguishing *Montana* in part on the ground that the non-Indian conduct at issue there "posed no threat to the welfare of the Tribe").

Viewed in the light shed by this Court's other Indian law opinions, there should be no doubt that neither *Strate* nor *Montana* forecloses the jurisdiction of the tribal court over reservation-based claims asserted by tribal members, even on non-Indian land. This Court has recognized

that "[t]ribal courts play a vital role in tribal self-government and the federal government has consistently encouraged their development." *Iowa Mutual*, 480 U.S. at 14-15. One of the hallmarks of any organized and cohesive society is a system for resolving disputes in an orderly and predictable manner. "Without such a 'legal system', social organization and cohesion are virtually impossible. . . . " *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971). The power to establish a mechanism or system for the resolution of civil disputes arising within the territory of a sovereign and affecting its members unquestionably is an essential and inherent attribute of Indian sovereignty "because it is a necessary instrument of self-government and territorial management." *Merrion*, 455 U.S. at 137; *Iowa Mutual*, 480 U.S. at 14-15, 18-19; *Santa Clara*, 436 U.S. at 59-60, 65. Such a mechanism is at the core of a tribe's "political integrity." *Montana*, 450 U.S. at 566. Congress recognized this in both the Indian Tribal Justice Act, 25 U.S.C. § 3601 and in the Indian Tribal Justice Technical and Legal Assistance Act of 2000. The tribes' political and governmental interest in establishing a tribal court system for reservation based disputes involving its members is no less significant than the states. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) (state has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors); *Nevada v. Hall*, 440 U.S. 410, 424 (1979) (emphasizing a state's substantial interest in providing full protection to those who are injured on its highways through the negligence of both residents and nonresidents).

In this case then, there are vital ties between essential tribal interests and the tribal court's jurisdiction over

Floyd Hicks' tort claims. Most important, unlike *Strate*, Hicks is a resident tribal member. Both the political integrity and health and welfare of the Tribe are directly affected in this case since an injury to a resident tribal member directly implicates the Tribe's important governmental interest in providing a forum to allow tribal members to seek redress. To require tribal members to submit their claims to a forum other than the one they have chosen for themselves most assuredly infringes on their right to make and be governed by their own laws within the meaning of the above-quoted passage of *Williams*. Nothing in *Strate* is inconsistent with these principles.

3. This Court's Decision in *Oliphant v. Suquamish Indian Tribe* is Not Applicable to Questions of Civil Jurisdiction.

The Petitioner's reliance on *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 119 (1978), is also misplaced. That case held that the Suquamish Tribe could not assert criminal jurisdiction over non-Indians on reservation lands, but it was based upon reasoning that is not applicable to questions of civil jurisdiction:

> For several reasons . . . the reasoning of *Oliphant* does not apply to [civil cases]. First, although Congress's decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-Indians against Indians within Indian Country supported the holding in *Oliphant*, there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation. Moreover, the opinion of one Attorney General on which we

> relied in *Oliphant*, specifically noted the difference between civil and criminal jurisdiction.

National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. 845, 854 (1985) *citing* 7 U.S. Op. Att'y Gen. 174 (1855); *accord, Colville*, 447 U.S. at 153 (questions of tribal jurisdiction to tax non-Indians on the reservation "differ sharply" from *Oliphant*, "in which we stressed the shared assumptions of the Executive, Judicial and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians").

In the area of civil jurisdiction over reservation-based disputes between tribal members and non-Indians, the rule of *Williams* still applies, and it has not been overruled or limited by *Oliphant*, or any subsequent decisions of this Court.

4. The Court's Decision in Williams v. Lee is Not Limited to Actions Where Tribal Members Are Defendants.

The Petitioner's attempt to distinguish *Williams* based upon the alignment of the parties (Pet. brief, 19-20) is not supported by law or reason and would lead to absurd results. Although *Williams* upheld tribal court jurisdiction over a reservation action in which a non-Indian plaintiff sued a tribal member defendant, that case also supports the exercise of *concurrent* tribal and state jurisdiction in those cases where the parties are reversed, i.e., where a tribal member plaintiff sues a non-Indian defendant for a cause of action arising on the reservation.

The Tribe has a significant interest at stake, and the rights of the tribal member are implicated in either circumstance.

The point in *Williams* was that the tribal court had jurisdiction over the *subject matter* of the dispute. Obviously, the tribal member in *Williams* could have sued the non-Indian for events arising out of the same transaction (e.g., for breach of warranty arising from the same sale of goods) because the non-Indian "was on the reservation and the transaction took place there." 358 U.S. at 223. The premise of Petitioner's "sword" and "shield" argument is based upon a misunderstanding of the concept of exclusive versus concurrent state and tribal court jurisdiction. State court jurisdiction is not exclusive simply because the tribal member has the option to invoke it. *See Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 148-49 (1984); *see also Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 888-90 (1986). Although there may not be a threat to tribal self-government when "Indian plaintiffs choose to invoke the jurisdiction of" state courts, *Lambert v. Ryozik*, 886 P.2d 378, 380 (Mont. 1994), there is a direct threat to tribal sovereignty and an infringement on the right of tribal members to utilize tribal forums when Indian plaintiffs are forced to seek redress in state courts, and when they are deprived of the right to invoke the forums the tribe has provided. It makes no sense to suggest that state court jurisdiction becomes exclusive simply because Indian people have the right to invoke it. No case or act of Congress supports such a proposition. *See Sanders v. Robinson*, 864 F.2d 630, 634 n.4 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989) (rejecting the same argument Petitioner makes here).

5. Indian Tribes Are Not Divested of Their Sovereignty Simply Because They Authorize Non-Indians to Enter Reservation Lands.

Montana and *Strate* do not support the argument that tribal jurisdiction is divested in cases involving tribal members simply because the tribe authorizes a nonmember to enter reservation land, or gives up its "gatekeeping" right. (See Pet. brief, p.44). In *Merrion*, the Court specifically rejected the notion that tribal sovereignty is derived solely from the tribe's right to exclude non-Indians from tribal lands. *Merrion* clarified that the mere fact that a tribe grants a non-Indian a license to enter tribal land does not mean that the tribe thereby gives up its jurisdiction. This is true whether that jurisdiction is based on general principles of sovereignty or on the tribe's power, as a landowner, to exclude non-Indians from reservation lands:

> Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, ... When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian land also immunizes the non-Indian from the tribe's exercise of its lesser-included power to tax or to place other conditions on the non-Indian's conduct or continued presence on the reservation.

Merrion, 455 U.S. 144-45 (footnote omitted)(emphasis original).

The Court then rejected the argument that the tribe gave up its sovereign power by not reserving it in its lease with the non-Indian. Citing the longstanding proposition that Indian tribes have the rights of both landowner and sovereign, "dominion as well as sovereignty," 455 U.S. at 145 n.12, the Court held that the fact that the tribe, in its capacity as a landowner, had sold the "right to use the land" did not mean that the tribe had waived its sovereign power to regulate non-Indians on those lands. "Confusing these two results denigrates Indian sovereignty." *Id.* at 146. At the heart of the Court's ruling is the notion that tribal sovereignty encompasses much more than a landowner's right to exclude:

> To presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head, and we do not adopt this analysis.

Id. at 148.

These principles apply with equal force in the case at bar.

II. THE QUESTION OF THE DEFENDANTS' IMMUNITY FROM SUIT SHOULD INITIALLY BE RESOLVED IN THE TRIBAL COURT.

With respect to the question of the state's immunity from suit, it does not appear that the tribal courts or the Ninth Circuit dispute the notion that the state's sovereign immunity bars a suit in tribal court against the state and

its officials who act within the scope of their authority. Neither the Tribe nor the court below asserted that the Tribe can waive the sovereign immunity of the state. Instead, the question is whether the Nevada game wardens who were defendants in the tribal court suit acted outside the scope of their authority as state officers and thus were no longer clothed with the immunity of the state. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 686-90 (1949). In such a case the defendants are subject to the jurisdiction of the court just like any other individual.

Although the defendants can assert qualified immunity as a defense even when sued individually, the defense is not jurisdictional, it is a personal affirmative defense. *Hafer v. Melo*, 502 U.S. 21, 28 (1991). Moreover, to the extent that the immunity defenses are based on federal law and to the extent they affect the jursidiction of the tribal court over a defendant's person, then they can be reviewable in federal court. *National Farmers*, 471 U.S. at 856. However, the Tribal Court should be given the first opportunity to take evidence and rule on these defenses, under the principles discussed in *National Farmers*, 471 U.S. at 856-57, and *Iowa Mutual, supra*, 480 U.S. at 14-17. *Amici* submit that the Ninth Circuit's ruling is this regard was correct.

CONCLUSION

For the foregoing reasons, the decision of the lower court should be affirmed.

Respectfully submitted,

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